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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN RE:)	No. CV 08-01109 VRW
SHANNON M. FALK,)	
Debtor.)	BK No. 07-10865
_____)	Chapter 11
SHANNON FALK,)	
Plaintiff/Appellee,)	A.P. No. 07-1080
v.)	
MICHAEL FALK,)	
_____)	
Defendant/Appellant.)	<u>APPELLEE'S BRIEF</u>

on Appeal From
The United States Bankruptcy Court
Northern District of California

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CASE LAW AND AUTHORITIES

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STATUTES

28 U.S.C. Section 158.	1
Chapter 11 of Title 11 U.S.C.	2
Section 852(a) of the Family Code	3

RULES

FRCP Rule 8(c)	6
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I.

APPELLATE JURISDICTION

The United States District Court has jurisdiction to hear bankruptcy appeals from "final judgments, orders and decrees" pursuant to 28 U.S.C. Section 158(a)(1).

II.

STANDARD OF REVIEW

The standard of review by a District Court of a bankruptcy court's decision is identical to the standard applicable to review by a Circuit Court of a decision of a District Court. Ford v. Baroff, 105 F.3d 439 (9th Cir., 1997). The District Court reviews the factual findings of a Bankruptcy Court for clear error and its conclusions of law de novo. See, Diamant v. Kasparian, 165 F.3d 1243, 1245 (9th Cir. 1999).

The "facts" found by the Bankruptcy Court were embodied in the Property Agreement as extrinsic evidence was excluded from consideration other than the fact of execution by the parties. The "facts" were not contested or controverted as the matter was decided on the basis of a Motion made pursuant to FRCP Rule 56. The meaning of the three documents upon which the Motion and the Judgment is based are findings of fact and are reviewed for clear error.

Conclusions of law as to the effect of the meaning ascribed to the words of the agreement is reviewed de novo.

1 **III.**

2 **STATEMENT OF ISSUES ON APPEAL**

3 The sole issue on appeal is whether the Property
4 Agreement which was admittedly executed and delivered by
5 the Appellee and Appellant operated to transmute the
6 property described therein to community property and
7 thereby property of the estate.

8
9 **IV.**

10 **FACTUAL AND PROCEDURAL BACKGROUND**

11 Appellee filed a Petition for Relief pursuant to
12 Chapter 11 of Title 11 U.S.C. on July 20, 2007 to prevent
13 foreclosure on marital property which was the subject of
14 a pending marital dissolution proceeding.

15 During the course of the marriage to one another,
16 Appellee and Appellant entered into three separate
17 agreements in connection with planning their financial
18 lives. One of the agreements was Property Agreement
19 which unequivocally provided that specified property,
20 theretofore separate in character, would be transmuted to
21 community property [E.R. 2]. Appellant vehemently
22 contested the effect of the Property Agreement when he
23 decided to end the relationship and purported to
24 unilaterally revoke the Marital Trust and thereby revest
25 himself with property, formerly separate, but transmuted
26 to community [E.R. 4]. Appellee commenced an Adversary
27 Proceeding on October 10, 2007 in an effort to obtain
28 some immediate relief relating to pending foreclosure and

1 pending relief from stay motions. The Complaint sought
2 characterization of certain described partnership
3 interests as property of the estate and turnover.
4 Discovery was taken in the case. Appellee filed her
5 Motion for Summary Judgment on November 21, 2007 [E.R.
6 2]. The matter came on for hearing before the United
7 States Bankruptcy Court on January 11, 2008 and was
8 decided by written Memorandum of Decision filed January
9 22, 2008 [E.R. 6]. The Appellee's Motion was granted and
10 the Appellant's counter Motion was denied [E.R. 7].

11 The Appellant filed his Notice of Appeal on February
12 11, 2008 following entry of the Order Granting Motion for
13 Summary Judgment [E.R. 9]. The Judgment [E.R. 10] was
14 entered June 23, 2008.

15 16 V.

17 DISCUSSION

18 **The Property Agreement unequivocally provides that**
19 **the property described therein is transmuted to community**
20 **property.**

21 Section 852(a) of the Family Code provides that a
22 transmutation of real or personal property is invalid
23 unless made in writing by an express declaration that is
24 made, join in, consented to, or accepted by the spouse
25 whose interest in the property is adversely affected.
26 The California Supreme Court has held that an "express
27 declaration" requires language that the characterization
28 of ownership of property is being changed.

1 The Property Agreement specifically provides: (1)
2 that all property owned by the parties as of June 2,
3 2004, title to which is (i) held in both names or joint
4 tenancy, or (ii) titled in the Michael T. and Shannon M.
5 Falk Marital Trust, unless specifically designated as the
6 separate property of either of the parties) is community
7 property; and (2) the parties agree to change the
8 character of any such property to community property.

9 Contemporaneous with the execution of the Property
10 Agreement and Amended Trust instrument, Appellant
11 executed an assignment of interest of the New York
12 Limited Partnership interests to the Marital Trust.

13 There is no property titled to the Trust which is
14 designated as separate property. The property titled to
15 the Trust is specifically designated in Exhibit A as
16 "Community Property".

17 The standard established by the California Supreme
18 Court in Estate of McDonald, (1990) 52 C.3d 262 is
19 precisely the terms of the last sentence of paragraph 1
20 of the Property Agreement, i.e., words evidencing intent
21 to "change" the "character" of the property.

22 In re Marriage of Starkman, (2005) 129 C.A.4th 659,
23 also relied upon by Appellant is factually different from
24 the within case. In Starkman, supra., the husband
25 transferred separate property to a trust without stating
26 that the property is separate. The trust provided that
27 property transferred and not identified as separate would
28 be community. The Court of Appeal held that the trust

1 did not contain an express declaration of intent to
2 change the character of the property. Unlike Starkman,
3 the Property Agreement does, in fact, contain such an
4 express statement of intent to change ownership and the
5 Bankruptcy Court so found.

6 **Reliance on the retention of character language of**
7 **the Trust is misplaced.**

8 The transfer or withdrawal of property transferred to
9 the Trust retains its character after the transfer or
10 withdrawal. The Property Agreement specifically provides
11 that the character of property titled to the Trust will
12 be changed to community. The New York Partnership
13 interests having been transferred to the Trust were
14 transmuted to community property retain their community
15 character even upon withdrawal or termination of the
16 Trust.

17 **The Property Agreement does not contain conflicting**
18 **provisions.**

19 The 2nd paragraph of the Property Agreement provides
20 that notwithstanding the 1st paragraph, property titled to
21 the Trust and held in either of the parties names alone
22 or designated as separate property in the Trust is not
23 subject to the transmutation provisions of the 1st
24 paragraph.

25 The Appellant transferred title of the New York
26 Partnership interests to the Trust and designated same as
27 "Community Property" in the express terms of the Trust.
28 The New York Partnership interests, regardless of the

1 original character, were characterized as community
2 property, transferred to the Trust and retained the
3 community character.

4 **The transmutation intended by the Property Agreement**
5 **was not conditioned upon the death of either of the**
6 **parties.**

7 The proposition that the Property Agreement was only
8 effective upon death and not effective upon dissolution
9 of the marriage is not supported by the language of the
10 3rd paragraph of the Property Agreement. The paragraph
11 does not limit the effect of the transmutation of the
12 property to the event of death. The last sentence of
13 paragraph 1 is clear that a present intent to "change"
14 the character of property to community.

15 Any determination of character on death of either
16 party was to be determined by the terms of the agreement.
17 The change in character was in the present not the
18 future. Appellant's reading of the paragraph is
19 disingenuous.

20 **Undue influence and breach of fiduciary duty are**
21 **affirmative defenses not plead and not raised by the**
22 **Appellant prior to the appeal.**

23 Despite having plead seven (7) separate affirmative
24 defenses, Appellant did not plead the two which he now
25 asserts on appeal.

26 FRCP Rule 8(c) requires that duress and undue
27 influence be set forth in the responsive pleadings as
28 affirmative defenses. Every affirmative defense except

1 those which specifically may be asserted by motion under
2 FRCP Rule 12 must be affirmatively plead in the response.
3 Fraud and mistake must be plead with particularity. FRCP
4 Rule 9(b).

5 Failure to plead an affirmative defense, waives the
6 defense. In re Hansen, 368 B.R. 868 (9th Cir. BAP 2007).

7 Not only were the affirmative defenses not plead, the
8 affirmative defenses were not raised in opposition to the
9 Motion for Summary Judgment [E.R. 4, 8]. Surprise should
10 not result from the fact that the Appellant was not
11 provided an opportunity to litigate such defenses. The
12 issues raised by the Appellant relating to undue
13 influence and breach of fiduciary duty are being raised
14 for the first time on appeal. An issue may not be raised
15 for the initial time on appeal. Appellate courts
16 normally decline to consider issues raised for the first
17 time on appeal. In re Roberts, 331 B.R. 876 (9th Cir. BAP
18 2005). Appellant courts have discretion to consider
19 issues initially raised on appeal. In re Wind Power
20 Systems, Inc., 841 F.2d 288, 290 n.1 (9th Cir. 1988).
21 Issues not raised and argued before the Bankruptcy Court
22 are most times not considered on appeal as evidence was
23 not taken and the issue not ruled upon. In re Martin,
24 156 B.R. 47 (9th Cir. BAP 1993).

25 Appellant waived the affirmative defenses by failing
26 to plead them in his responsive pleading [E.R. 1].
27 Appellant failed to argue or submit in opposition to the
28 Appellee's Motion for Summary Judgment (or, even in

1 support of the Counter Motion) any fact from which such
2 defenses could even be inferred. Appellant's failure to
3 even consider the affirmative defenses until this point
4 in the case is indicative of the weight of the evidence
5 that could be expected had the defenses been timely
6 asserted and not waived.

7
8 **VI.**

9 **CONCLUSION**

10 The Appellant and Appellee executed the Property
11 Agreement, the Amendment to the Marital Trust, and the
12 transfer document. These facts were not controverted by
13 the Appellant.

14 The determination that the Property Agreement
15 operated to "change" the character of the categories of
16 property described is supported by Exhibit A to the Trust
17 which designates the subject property as "Community
18 Property Transferred to the Trust". As the Bankruptcy
19 Court correctly held, the transfer to the Trust did not
20 operate to change the character. The Property Agreement
21 contains an express declaration of the intent to change
22 the character of the property.

23 Appellant's attempt to mischaracterize the language
24 of the Property Agreement is painfully obvious. The
25 document contains an express declaration of intent. It
26 was entered into contemporaneous with the Trust and the
27 Assignment which documents are consistent and reiterate
28 the expressed intent.

1 It is respectfully submitted that the Judgment of the
2 United States Bankruptcy Court be affirmed.

3 Dated: 7/28/08 Respectfully submitted,
4 DAVID N. CHANDLER, p.c.

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6 By: /s/ David N. Chandler
7 DAVID N. CHANDLER,
8 Attorney for Appellee
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